82-923

No. 82-...
IN THE

Supreme Court of the United States

October Term, 1982

NORTHWEST EXCAVATING, INC.,

Petitioner,

vs.

WILLIAM C. WAGGONER, FRANK TODD, FREEMAN ROBERTS, DALE VAWTER, WILLIAM A. COBB, JR., HOWARD C. DENNIS, JOHN L. CONNOLLY, JOHN BEBEK, JERALD B. LAIRD, JOHN C. MAXWELL, ALEXANDER RADOS and WILLIAM SCHMIDT, each in his respective capacity as Trustee of the Operating Engineers Health and Welfare Fund; WILLIAM C. WAGGONER, FRANK TODD, WILLIAM C. COBB, JR., FREEMAN ROBERTS, DALE VAWTER, JOHN L. CONNOLLY, C. V. HOLDER, JOHN BEBEK, KENNETH J. BOURGUIGNON, HOWARD C. DENNIS, JAMES J. KIRST and JOHN C. MAXWELL, each in his respective capacity as Trustee of the Operating Engineers Pension Trust; WILLIAM C. WAGGONER, FRANK TODD, FREEMAN ROBERTS, DALE VAWTER, WILLIAM C. COBB, JR., HOWARD C. DENNIS, ALEXANDER RADOS, JOHN BEBEK, JAMES J. KIRST, JERALD B. LAIRD and C. I. T. JOHNSON, each in his respective capacity as Trustee of the Operating Engineers Vacation-Holiday Savings Trust; WILLIAM C. WAGGONER, FRANK TODD, FREEMAN ROBERTS, DALE VAWTER, VERNE W. DAHNKE, WILLIAM A. FLOYD, ALEXANDER RADOS, WILLIAM SCHMIDT, HOWARD C. DENNIS, C. I. T. JOHNSON, JOHN BEBEK and ROBERT LYTLE, each in his respective capacity as Trustee of the Operating Engineers Journeymen and Apprentice Training Trust,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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Question Presented.

Whether the federal courts, in actions brought under Section 301 of the Labor Management Relations Act, 1947, as amended, 29 U.S.C. § 185, may consider or apply both state law and related federal statutes which authorize an award of attorneys' fees to the prevailing party in a breach of contract action?

This precise issue was presented to the Court by Petitioner in *Northwest Excavating, Inc. v. Waggoner*, ___ U.S. ___, 71 L.Ed.2d (1982), *vacating* 642 F.2d 333 (9th Cir. 1981), but was not addressed by the Court in its Order vacating the Ninth Circuit's earlier decision below and remanding the matter for further consideration in light of *Kaiser Steel Corp. v. Mullins*, 445 U.S. 72 (1982).

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October Term, 1982

NORTHWEST EXCAVATING, INC.,

Petitioner,

vs.

WILLIAM C. WAGGONER, *et al.*, etc.,

Respondents.

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered in this proceeding on September 3, 1982, after remand of the matter from this Court.

Citations to Opinions Below.

The Findings of Fact and Conclusions of Law of the United States District Court for the Central District of California (CV-77-3701-WMB), printed in Appendix B, *infra*, were not officially reported. The opinion of the United States Court of Appeals for the Ninth Circuit, printed in Appendix C, *infra*, is reported in 642 F.2d 333. The order of the court of appeals, denying Respondents' petition for rehearing, is printed in Appendix D, *infra*. The order of the court of appeals, denying Petitioner's petition for rehearing, is printed in Appendix E, *infra*. The order of this Court vacating the court of appeals' judgment and remanding the matter for further consideration in light of *Kaiser Steel Corp. v. Mullins*, 455 U.S. 72 (1982), printed in Appendix F, *infra*, is reported in ___ U.S. ___, 71 L.Ed.2d 640. The

opinion of the United States Court of Appeals for the Ninth Circuit on remand, dated September 3, 1982, and printed in Appendix G, *infra*, is reported in 685 F.2d 1224.

Jurisdiction.

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on September 3, 1982, Appendix G, *infra*. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Statutes Involved.

The United States statutes involved are Section 301 of the Labor Management Relations Act, 1947, as amended, 61 Stat. 156, 29 U.S.C. § 185(a), Section 502(g) of the Employee Retirement Income Security Act of 1974, as amended, 88 Stat. 891, 29 U.S.C. § 1132(g), and Section 4301(e) of the Multiemployer Pension Plan Amendments Act of 1980, 94 Stat. 1263, 29 U.S.C. § 1451(e). The California statute involved is California Civil Code § 1717. These statutory provisions are set forth in Appendix A, *infra*.

Statement of the Case.

This petition seeks review of a judgment of the United States Court of Appeals for the Ninth Circuit upholding an order of a district court in an action brought by Respondents (the trustees of four jointly administered multi-employer trust funds) compelling, *inter alia*, the payment of Respondents' attorneys' fees by Petitioner. The jurisdiction of the district court was invoked under Section 301 of the Labor Management Relations Act, 1947, as amended (herein the LMRA), 61 Stat. 156, 29 U.S.C. § 185.

Petitioner is primarily engaged in the business of renting construction equipment with operating personnel to building contractors in the construction industry. Petitioner is a mem-

ber of the Southern California General Contractors Association (herein the Association); as such, Petitioner was bound to the Master Labor Agreement (herein the "MLA") negotiated between International Union of Operating Engineers, Local Union No. 12 and the Association. The MLA obligated Petitioner to pay fringe benefit contributions to the trust funds for each hour worked under the MLA by Petitioner's employees.

In their suit, Respondents claimed that Petitioner was obligated, but refused, to pay fringe benefit contributions to the trust funds for hours worked by independent owner-operators dispatched by Petitioner in its capacity as a broker for such services, and for hours worked by Frank Sandoval (herein Sandoval), an independent contractor, to perform maintenance and repair work on Petitioner's equipment.

After a trial on the merits, the district court ruled that Petitioner was not obligated to make contributions for owner-operators dispatched by it as a broker. The district court determined that, under the terms of the MLA, the general contractor to which the owner-operators were dispatched, and not Petitioner, had the obligation, if any existed, to treat the owner-operators as employees and to make contributions for them. The court of appeals upheld the district court's interpretation of the MLA in this respect.

The district court also held that Sandoval was an independent contractor, and not an employee of Petitioner. The district court ruled, however, that Petitioner breached the MLA by utilizing "non-employees" to perform maintenance and repair work on its equipment and that the trust funds, therefore, had been damaged in an amount equal to the contributions that Petitioner would have been obligated to pay if it had utilized "employees" to perform the work. In reaching this conclusion, the lower court specifically rejected Petitioner's contention that the operative provisions

of the MLA were void and unenforceable because they violated Section 8(e) of the LMRA, 73 Stat. 519, 29 U.S.C. § 158(e).

The court of appeals upheld the district court's finding that Petitioner breached the MLA by assigning repair work to Sandoval. In doing so, the court refused to consider Petitioner's defense that the subcontracting provisions of the MLA were "hot cargo" clauses which are proscribed under § 8(e).

Prompted by the court of appeals' refusal to consider Petitioner's statutory defense, on November 2, 1981, Petitioner filed with this Court a Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit. Thereafter, this Court issued its decision in *Kaiser Steel Corp. v. Mullins*, 455 U.S. 72 (1982), which decision resolved the first issue presented by Petitioner herein.[1] Accordingly, by order dated February 22, 1982, this Court vacated the court of appeals' judgment and remanded the matter for further consideration in light of *Kaiser Steel Corp., supra*.

On remand, the court of appeals addressed, but rejected, Petitioner's defense founded on § 8(e), ruling that the contested contractual provision lawfully preserved bargaining

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[1]In its petition, Petitioner presented this Court with the following questions:

> "(1) Whether the federal courts, in suits brought under Section 301 of the Labor Management Relations Act, 1947, as amended, 29 U.S.C. § 185, are precluded from entertaining an affirmative defense that the contractual provisions sought to be enforced in such suits are 'hot cargo' clauses which are proscribed by Section 8(e) of that Act, (29 U.S.C. § 158(e)), and which, therefore, are 'unenforceable and void' as a matter of law?
>
> "(2) Whether the federal courts, in actions brought under Section 301 of the Labor Management Relations Act, 1947, as amended, 29 U.S.C. § 185, may consider or apply both state law and related federal statutes which authorize an award of attorneys' fees to the prevailing party in a breach of contract action?"

unit work. In light of that ruling, the court also refused to award Petitioner its attorneys' fees incurred for that portion of Respondents' action on which Petitioner prevailed, holding that application of California Civil Code § 1717, requiring mutuality of attorneys' fees entitlement, would violate this Court's ruling in *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975), and would frustrate the federal labor policy embodied in § 301 of the LMRA. Moreover, without any regard to Petitioner's success on several substantial issues of fact and law, the court of appeal, looking only to the strict wording of the MLA, overruled the district court and directed an award of attorneys' fees to Respondents for their partial success in the action.

REASON FOR GRANTING THE WRIT.

The Decision Below Regarding Attorneys' Fees Conflicts With Applicable State Law, Related Federal Statutes, and Decisions of This Court.

The question of whether state law authorizing an award of attorneys' fees to the prevailing party in breach of contract actions should be applied in actions brought under Section 301 of the LMRA, and the application of ERISA's[2] provisions to such actions, has never been determined by this Court.

The decision of the court below directly conflicts with California law, as the court of appeals specifically rejected state law in order to judicially create a uniform national attorneys' fees rule in § 301 actions. In fashioning a new national attorneys' fees rule, however, the court of appeals totally ignored *International Union v. Hoosier Cardinal Corp.*, 383 U.S. 696 (1966), wherein this Court held that it was proper in a § 301 suit to apply the Indiana 6-year statute of limitations, rather than judicially fashioning a uniform national statute of limitations for such actions. *Id.* at 704-05. In *Hoosier Cardinal*, this Court specifically ruled that uniformity alone did not supply a reason for ignoring applicable state law in § 301 suits and for engaging in drastic "judicial legislation." *Id.* at 703. This Court recently reaffirmed *Hoosier Cardinal* in *United Parcel Service v. Mitchell*, 451 U.S. 56 (1981).

Even in determining which substantive law to apply in § 301 suits, this Court has declared that "state law, if compatible with the purpose of Section 301, may be resorted to in order to find the rule that will best effectuate federal

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[2]Employee Retirement Income Security Act of 1974, as amended, 88 Stat. 829, 29 U.S.C. § 1001 *et seq.*

policy." *Textile Workers v. Lincoln Mills*, 353 U.S. 448, 456-57 (1957); *see also John Wiley & Sons v. Livingston*, 376 U.S. 543, 548 (1964) ("Federal law, fashioned 'from the policy of our national labor laws controls.' [Citation.] State law may be utilized so far as it is of aid in the development of correct principles or their application in a particular case. . . .").

Petitioner submits that the mutuality principle embodied in California Civil Code § 1717 is consonant with the explicit congressional design behind the national labor laws. Both Section 502(g) of the Employee Retirement Income Security Act of 1974 (herein ERISA), 88 Stat. 891, 29 U.S.C. § 1132(g), and Section 4301(e) of the recently enacted Multiemployer Pension Plan Amendments Act of 1980, 94 Stat. 1263, 29 U.S.C. § 1451(e), amending ERISA, specifically provide that the court, in its discretion, *may allow* attorneys' fees and costs to the prevailing party.

ERISA authorizes suits by and against employee benefit trust funds, and is clearly applicable federal law to which the federal courts should look in deciding whether attorneys' fees may properly be awarded in § 301 actions to compel the payment of assertedly delinquent trust fund contributions. The court of appeals totally ignored this relevant federal statute in rejecting the mutuality rule embodied in California law.

Moreover, the court of appeals' decision granting attorneys' fees to Respondents based on the MLA's one-sided provision, notwithstanding that Respondents did not prevail on a substantial portion of their action, frustrates the inherent principles of fairness and justice that Congress sought to embody in § 301. By applying the MLA to Respondents' unilateral advantage, the court below casts upon would-be defendants a serious dilemma: On one

hand, a defendant sued under a contract with a one-sided attorneys' fee provision should, like all other litigants, present those defenses that are reasonably available, and should pursue them with an appropriate level of vigor. On the other hand, under the court of appeals' decision, the defendant does so at the risk of losing far more than he may have bargained for. Should he lose, he will be liable not only for the damages sought in the suit on the merits, but also for the attorneys' fees incurred by the plaintiff in rebutting the defendant's own arguments; yet, if he should win, he would still be responsible for at least his own attorneys' fees incurred in pursuing a successful defense. Petitioner submits that such a dilemma is inequitable; indeed, it presents defendants in trust fund actions such as this with a painfully real no-win situation.

Certainly contractual provisions requiring the party found to be in breach to pay attorneys' fees serve a useful and laudible function, in that they discourage dilatory tactics and encourage compliance with contractual obligations. At the same time, principles of fairness and justice dictate that such provisions not be interpreted to overreach their usefulness by discouraging good faith and possibly meritorious defenses. The vice in such provision is obvious: a defendant may be reluctant to interpose a defense that quite possibly would succeed because the potential exposure, should the defense fail, would be too great. Nor is the problem remedied by the possibility that a meritorious defense will result in a defense verdict, and hence no liability for fees, since, absent a mutual right to recover one's own fees, the inherent uncertainties of litigation will no doubt deter the presentation of some viable defenses before they can be offered to the courts for determination. Thus, the provision might serve in many cases to coerce a defendant to settle the case on the trust funds' terms, or to try the case with something less

than the total commitment that the adversary system demands. The only way to blunt the harsh deterrent effect created by such a provision is to imply a mutuality entitlement to attorneys' fees via application of California Civil Code § 1717 if the defense should prevail.

This Court must be aware of the fact that innumerable employers in the construction industry are unable to withstand the financial burden of protracted litigation with trust funds whose combined assets far exceed the individual contractor's assets. Also, thousands of small contractors are essentially forced to sign short form contracts to master labor agreements, as in the instant case, which contain provisions of questionable legality. These small contractors do not, in reality, participate in collective bargaining negotiations. And, in actual application, such agreements are often nothing more than adhesion contracts. The mutuality principle was designed to protect such parties.

Many contractors are forced into compromising their positions rather than challenging either the accuracy of the trust funds audits or the validity of the trust funds' claims, which claims are sometimes based upon illegal and unenforceable contract provisions. Of course, the cumulative impact of the use of economic pressure under the veil of contract enforcement to force contractors to do, or agree to do, something that they had not agreed to in collective bargaining, or which is otherwise illegal, invariably leads to a breakdown in the faith which unions and employers alike must have in collective bargaining, which faith is so fundamental to the workings and success of the national labor laws.

The mutuality policy embodied in California Civil Code § 1717 obviates such an unjust, absurd result; it should be imported in federal labor law in order to lessen the coercive impact of claims such as those brought by the Respondents

herein. Far from frustrating the congressional design behind the national labor laws, § 1717 assures that parties to collective bargaining agreements, as well as third party beneficiaries thereof, will not be coerced into abandoning good faith, meritorious defenses to claims such as this. The clear congressional policy of enforcing *only* those duties and obligations to which the parties agreed during collective bargaining and/or are bound to as a matter of law would thus be served.

A contractual provision allowing attorneys' fees to only one party is unfair and contrary to public policy. Such a provision upsets the delicate balance of power in labor relations which is necessary for effective collective bargaining. In reaching its decision, however, the court below essentially jettisoned a balanced national labor relations policy by refusing to entertain a mutuality approach, sanctioned under both the state and federal statutes, in determining an entitlement to an award of attorneys' fees.

It is submitted, therefore, that the court below, by declining to award attorneys' fees and costs to Petitioner for its defense of this action, at least to the extent that it has prevailed, substantially departed from this Court's *Hoosier Cardinal* rule, ignored the relevant recent expressions of congressional intent on attorneys' fees entitlement under ERISA, and directly contradicted otherwise applicable state law.

Conclusion.

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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